

In this appeal from the Justice of the Peace Court, ESF Bid Company, Inc. (hereinafter “ESF”) brings an action to recover funds it allegedly paid for services of the prior property owner. Defendant Below/Appellee, Delmarva Power & Light (hereinafter, “Delmarva”) brings this motion pursuant to Court of Common Pleas Civil Rule 12(b)(1) to dismiss this appeal and pending action on the basis the Court lacks subject matter jurisdiction. Delmarva maintains that the Delaware Public Service Commission (hereinafter, “PSC”) has exclusive jurisdiction over this claim. Secondly, Delmarva moved to dismiss the complaint for failure to state a claim under

Court of Common Pleas Civil Rule 12(b)(1). Thirdly, Delmarva moved to dismiss on the basis the appeal violates the Mirror Image Rule, as set forth in *Court of Common Pleas Civil Rule 72.3(f)*. Plaintiff Below/Appellant ESF Bid Company, Inc. (hereinafter, “ESF”) opposes this motion on the basis that the PSC does not have jurisdiction over its claim and maintains that the ruling by the Justice of the Peace Court was erroneous.

FACTS

A motion to dismiss is a pretrial motion, and for the purposes of these proceedings, the following facts are assumed to be true: ESF is the owner of the property located at 7807 Governor Printz Boulevard., Claymont DE 19703, known as River Club. This property contains an apartment complex for elderly tenants. On February 28, 2009, ESF purchased the default mortgage note for the property held by Captain’s Deck, Inc. (hereinafter, “Captain’s Deck”). ESF foreclosed on the note, took possession of the property from Captain’s Deck, and entered into a management agreement with Stonehenge Advisors, Inc. (hereinafter, “Stonehenge”). Shortly thereafter, Delmarva contacted Stonehenge and stated that a past due balance of \$15,827.51 was owed on the property by Captain’s Deck. ESF paid the past due amount in full due to threats by Delmarva of an imminent shutting off of electric and gas services. After a new account was established in ESF’s name, Delmarva again threatened to shut off service to the property if ESF did not immediately make payment in the amount of \$22,841.97. Stonehenge and ESF unsuccessfully

attempted to have the previous payment of \$15,827.51 applied to the new account. Essentially, this is a debt action with a billing dispute.

ESF first brought its claim to the PSC who dismissed the action with prejudice for failure to prosecute on March 16, 2010. ESF did not petition the PSC for a rehearing or file a timely appeal to Superior Court. Rather, ESF filed an action in the Justice of the Peace Court on June 1, 2010, and amended the Complaint in that case on July 23, 2010. Delmarva filed a Motion to Dismiss on July 6, 2010. The Justice of the Peace Court dismissed the claim on January 26, 2011 for lack of subject matter jurisdiction. ESF made a timely appeal to this Court on February 7, 2011. Delmarva filed the instant Motion in this Court on March 30, 2011. On April 29, 2011, the Court heard oral argument from both parties on the Motion. The Court reserved decision and ordered the parties to provide supplemental briefs to the Court.

STANDARD OF REVIEW

This is an appeal *de novo* from the Justice of the Peace Court. When considering a motion to dismiss for lack of subject matter jurisdiction pursuant to *Court of Common Pleas Civil Rule 12(b)(1)*, the Court must determine whether it appears “with reasonable certainty that, under any set of facts which could be proven to support the claim, the plaintiffs would be entitled to relief.”¹ For purposes of a motion to dismiss, the Court assumes that the material factual allegations set forth in

¹ *Mortgage Electronic Registration Systems, Inc. v. Haase and Flanagan*, 2006 WL 1454807 at *1 (Del. Super. Ct. May 19, 2006) citing *Vanderbilt Income & Growth Assoc. L.L.C. v. Arvida/JMB Managers, Inc.*, 691 A.2d 609, 612 (Del. 1996).

the Complaint are true, and all reasonable inferences are made in the light most favorable to the Plaintiffs as the non-moving party.²

When deciding a motion to dismiss for failure to state a claim pursuant to *Court of Common Pleas Civil Rule 12(b) (6)*, the Court will not dismiss the complaint unless the plaintiff would not prevail under any reasonably conceivable set of circumstances.³ The claim will not be dismissed unless it is clearly without merit, either as a matter of law or of fact.⁴

DISCUSSION

Delmarva moves to dismiss this appeal from the Justice of the Peace Court on the basis that this Court lacks subject matter jurisdiction. Delmarva's position is that "exclusive jurisdiction" for this issue lies within the PSC, a forum that is no longer available to ESF for procedural reasons.

The Courts of Delaware have adopted the doctrine of exhaustion of remedies, which requires that "where a remedy before an administrative agency is provided, relief must be sought by exhausting this remedy before the courts will either review the action by the agency or provide an independent remedy."⁵ This doctrine applies "only where a claim must be initiated before an administrative agency which has exclusive jurisdiction over the matter and is able to provide an adequate remedy."⁶ Exhaustion of remedies is to be distinguished from the doctrine of primary

² *Id.*

³ *Jackson v. Fleming*, 2005 WL 2090773 at *1 (Del. Super. Ct. Apr. 27, 2005).

⁴ *Diamond State Tel. Co. v. University of Delaware*, 269 A.2d 52 (Del. 1970).

⁵ *Levinson v. Del. Comp. Rating Bureau*, 616 A.2d 1182 (Del. 1992).

⁶ *Levinson*, 616 A.2d at 1187 citing *Eastern Shore Natural Gas Co. v. Stauffer Chemical Co.*, 298 A.2d 322, 325 (Del. 1972).

administrative jurisdiction, which applies where “a claim is originally cognizable in a court of law or equity but referral to an agency competent to rule preliminarily issues which fall within its regulatory powers is authorized.”⁷ Before determining whether which doctrine is appropriate, the Court must determine whether either should be applied.

ESF argues that the PSC was not the proper venue to review its claim because it did not have jurisdiction. To support this argument, ESF cites 26 *Del. C.* § 201(a), which defines the jurisdiction of the PSC:

The Commission shall have exclusive original supervision and regulation of all public utilities and also over their rates, property rights, equipment, facilities, service territories and franchises so far as may be necessary for the purpose of carrying out the provisions of this title. Such regulation shall include the regulation of the rates, terms and conditions for any attachment (except by a governmental agency insofar as it is acting on behalf of the public health, safety or welfare) to any pole, duct, conduit, right-of-way or other facility of any public utility, and, in so regulating, the Commission shall consider the interests of the subscribers, if any, of the entity attaching to the public utility’s facility, as well as the interests of the consumer of the public utility service.

Delmarva characterizes ESF’s action as seeking equitable relief by demanding to have the funds that that were paid on March 12, 2009 returned and applied to the security deposit ESF’s account. This, according to Delmarva, is a request for an equitable remedy over which the PSC has exclusive jurisdiction. In support of its motion, Delmarva cites *Georgia-Pacific Corp. v. Delmarva Power & Light*, in which the Court holds that “[c]laims for equitable relief... implicate the PSC’s power to regulate

⁷ *Id.*

and supervise utility services. They therefore fall within the PSC's exclusive jurisdiction."⁸

Delmarva's arguments in the present case have substantial similarities to those in *Georgia-Pacific*. In both cases, Delmarva argued that this Court lacks subject matter jurisdiction because the PSC has exclusive jurisdiction over disputes relating to Delmarva's tariffs, and that the PSC is fully capable of providing the plaintiff with remedies equivalent to those in this Court. The similarities do not end there. In both cases, Delmarva also argues that the plaintiff failed to exhaust its administrative remedies. *Georgia-Pacific*, however, dealt with an issue over service termination, while the present case is a controversy over billing. The Court in *Georgia-Pacific* held that the PSC has jurisdiction to decide a service termination issue, but not to decide a billing dispute, which is for a court to determine.⁹ The PSC "does not sit as a court of law," and is not the proper venue to adjudicate the debt controversy between the parties.¹⁰

The holding in *Georgia-Pacific*, I find applicable to the facts of this case. The record clearly shows that there is a bona fide issue over ESF's liability for the past due amount owed under the Captain's Deck account, and whether the \$15,827.51

⁸ *Georgia-Pacific Corp. v. Delmarva Power & Light*, 1992 WL 396307 (Del. Ch. Ct. Dec. 31, 1992).

⁹ *Georgia-Pacific*, 1992 WL 396307 at *6 citing *Artesian Water Co. v. Cynwyd Club Apartments, Inc.*, 297 A.2d 387 (Del. 1972).

¹⁰ *Artesian Water*, 297 A.2d at 389.

was correctly applied to the Captain's Deck account. As such, the PSC holds no jurisdiction over this issue over billing, and the proper venue is this Court. Neither doctrine of exhaustion of remedies nor primary administrative jurisdiction applies here.

In its motion to dismiss, Delmarva also argues that this appeal must be dismissed because of a violation of the Mirror Image Rule, codified in *Court of Common Pleas Civil Rule 72.3(c)*, because in the initial complaint in the Justice of the Peace action, ESF was named as "ESF Bid Company, LLC." In this appeal, ESF is identified as "ESF Bid Company, Inc." The rule in this State requires "exactness in the names of the parties", so party names below must be identical to the party names on appeal.¹¹ The rule, however, does not necessitate dismissal of the action where it is clear from the pleadings that the defendant is an artificial entity and is identified as such in both proceedings, as the same party.¹² It is clear from the pleadings that the parties are identical, and ESF using the caption "ESF Bid Company, LLC" below and "ESF Bid Company, Inc." here does not require dismissal. Therefore, Delmarva's argument is without merit.

The Court further finds the motion to dismiss for lack of subject matter jurisdiction lacks merit. The Complaint alleges billing dispute between a utility service provider and its customer, a controversy over which the PSC holds no jurisdiction. The proper venue to adjudicate this controversy is the Courts. ESF has


¹¹ *McDowell v. Simpson*, 1 Houst. 467 (Del. Super. Ct. 1885).

¹² *Freibott v. Patterson Schwartz, Inc.*, 740 A.2d 4 (Del. Super. Ct. 1999)(holding that appellant's appeal naming "Patterson Schwartz, Inc." rather than "Patterson Schwartz and Associates, Inc." is not fatal to the appeal); *See also Freedman v. Aronoff*, 1994 WL 555429 at *2 (rejecting as meritless an argument that lacking the phrase "his wife" and the "P." from his wife's name was fatal to the appeal).

shown there to be a bona fide issue as to its liability for the bill owed under the Captain's Deck account, and whether the \$15,827.51 paid to Delmarva was correctly applied to that bill. Therefore, the Court cannot dismiss this action based on a failure to state a claim at this time.

For the foregoing reasons, Delmarva's Motion to Dismiss is hereby **DENIED**, and the case shall proceed as provided by the Rules. Delmarva shall file a responsive pleading within twenty (20) days.

SO ORDERED



Alex J. Smalls
Chief Judge

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